

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN D. PRITCHETT

Claimant

VS.

JACK COOPER TRANSPORT COMPANY, INC.

Respondent

AND

**LIBERTY MUTUAL INSURANCE COMPANY and
CONTINENTAL NATIONAL INDEMNITY COMPANY**

Insurance Carriers

Docket Nos. 218,941
& 1,054,065

ORDER

Claimant appeals the February 24, 2011, Order¹ of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was denied medical treatment for his left knee after the ALJ found that the need for left knee arthroplasty is due to a 2001 injury, suffered, litigated and settled in Missouri, and not the 1994 injury nor the cumulative trauma through claimant's last day worked. Claimant's attorney's request for a fee for post-award services in Docket No. 218,941 was also denied.

Claimant appeared by his attorney, John E. McKay of Kansas City, Missouri. Respondent and one of its insurance carriers, Liberty Mutual Insurance Company (Liberty Mutual), appeared by their attorney, Stephanie Warmund of Kansas City, Missouri. Respondent and one of its insurance carriers, Continental National Indemnity Company (Continental National) appeared by their attorney, Michelle Daum Haskins of Kansas City, Missouri.

¹ The parties agreed at the hearing that these matters, even though they encompass both a preliminary hearing request and a post-award medical request, could be handled together as a preliminary hearing. The Appeals Board has jurisdiction over the post-award matter pursuant to K.S.A. 44-510k, and over the preliminary hearing question, pursuant to K.S.A. 44-534a, of whether claimant's ongoing duties with respondent accelerated, intensified or aggravated his need for a total left knee replacement.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of P. Brent Koprivica, M.D., taken January 14, 2011, with attachments; the deposition of Lowry Jones, M.D., taken February 1, 2001; the transcript of Preliminary Hearing held February 23, 2011, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did the May 5, 1994, work injury or injuries to claimant's left knee, which required two separate surgeries and led to a settlement in Docket No. 218,941, with medical treatment left open, accelerate, intensify or aggravate the need for a total left knee replacement? Claimant contends that his current need for a total left knee replacement stems, at least partially, from the injury suffered on May 5, 1994, while claimant was working for respondent. Respondent contends, and the ALJ found, that the 1994 injury was not the cause of the needed knee surgery. Instead, an intervening injury suffered while claimant was working for respondent in 2001 in Missouri was the instigator of the needed surgery. This matter was settled by claimant and respondent as to all issues, including the right to future medical treatment.
2. Did claimant's ongoing employment duties for respondent, which required squatting and climbing hundreds of times each week, and lifting up to 130 pounds while squatting or standing, accelerate, intensify or aggravate the need for claimant's total left knee replacement surgery? Again, respondent contends that the need for the left knee replacement surgery stems from the traumatic injuries suffered in 2001 in Missouri. Claimant contends that the testimony of board certified occupational and preventative medicine specialist P. Brent Koprivica, M.D., supports a finding that claimant's need for the surgery stems not only from the 1994 accident, but also from claimant's continued employment duties for respondent through November 1, 2010.
3. Is claimant's attorney entitled to attorney fees and costs associated with the litigation in Docket No. 218,941, regarding the 1994 accident and its effect on claimant's left knee? The ALJ determined that no attorney fees or costs were appropriate as the 1994 accident was not the cause of nor did it affect the need for a total left knee replacement.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the Order should be reversed, although on other grounds, and benefits should be awarded to claimant for the left knee surgery stemming from claimant's ongoing employment duties with respondent. The denial of post-award attorney fees is affirmed.

Claimant had been working for respondent for many years as a truck driver when, on May 5, 1994, he suffered an accidental injury to his left knee. As a result of that injury, he underwent a partial medial meniscectomy and loose body removal. Claimant then underwent a second surgery on April 3, 1996, under the hand of Dr. William Reed, who found grade II patellofemoral groove chondromalacia with a 50 percent loss of cartilage and a tear of the inferior flap of the posterior horn of the medial meniscus. Additional loose cartilage fragments were removed. That claim was settled on a running award on January 16, 1997, with the right to medical treatment left open. Claimant was rated at 20 percent to the left lower extremity at the time of that settlement.

On March 27, 2001, while working for the same respondent in Missouri, claimant suffered a new acute, traumatic injury to the left knee. Claimant came under the care of orthopedic surgeon Lowry Jones, M.D. Dr. Jones initially treated claimant with injections to the knee. When these proved unsuccessful, surgery was recommended. Claimant underwent a trochlear groove chondroplasty, patellar chondroplasty and partial medial meniscectomy on July 13, 2001. After the initial injury in 1994, claimant returned to work for respondent performing his regular duties. After the 2001 surgery, claimant was restricted to sedentary work with no kneeling, squatting, climbing or crawling. As of July 31, 2001, claimant's restrictions remained. On September 11, 2001, claimant's restrictions were removed. The matter went to settlement on May 24, 2004, based on a 40.82 percent permanent partial disability to the left lower extremity, with the right to future medical treatment being closed for all time. Dr. Jones found that as the result of the 2001 injury, claimant's cartilage loss in the trochlea and to the area of the kneecap was about 75 percent. Dr. Jones opined that approximately 60 percent of the left knee condition was related to the 2001 injury with some preexisting disease process being present in the left knee.² Dr. Jones was unable to say within a reasonable degree of medical certainty whether the 1994 accident and resulting surgeries aggravated or accelerated the need for a left knee replacement.

The ALJ, in the Order, noted that Dr. Jones was asked whether the 2001 accident led to the need for the total knee replacement. Dr. Jones answered that the "disease process that was present at the time of that injury in 2001 would have led to an eventual

² Jones Depo. at 18.

need for knee replacement, yes, that's correct".³ Based, in part, upon that answer, the ALJ found that claimant's need for the surgery stemmed from the previously settled 2001 accident in Missouri and not the 1994 injury or the cumulative trauma from claimant's ongoing work with respondent.

Claimant was referred by his attorney to Dr. Koprivica for an evaluation on May 3, 2010. In the report regarding that evaluation, it states that Dr. Koprivica evaluated claimant's lengthy and involved medical history dealing with injuries to his knees, upper extremities (including his left shoulder and right elbow), low back, right hip and legs, and also dealing with his heart, skin cancer and finger fractures. However, the only injury being dealt with in this litigation is the left knee. Dr. Koprivica found claimant's right knee to display more grinding arthralgia, swelling, range of motion limitations, limping and pain than the left. The report of May 3, 2010, appears to focus more on the right knee than the left. The need for a total knee replacement of the right knee was noted in the report. The right knee was rated at 50 percent to the lower extremity. There was no rating provided for the left knee in the May 3, 2010, report.

In an addendum to the May 3, 2010, report, Dr. Koprivica issued a report dated October 24, 2010. In that report, he stated that he did not have sufficient historical information regarding the left knee injuries and the need for a total knee replacement to determine whether the left knee surgery was related to a September 9, 2009, injury to claimant's right knee. Dr. Koprivica did state that the need for a total knee replacement on the left side was the result of claimant's prior work-related injuries with respondent.

Dr. Koprivica issued a third report dated December 26, 2010, again at the request of claimant's attorney. Prior to the issuance of this report, Dr. Koprivica was provided the records of claimant's 1994 left knee injury and the records of Dr. Jones from the 2001 left knee injury and subsequent treatment. From that information, Dr. Koprivica deduced that claimant's current need for the left knee replacement surgery stemmed from the 1994 accident and resulting surgeries. He also opined that the cumulative effects of claimant's ongoing job duties with respondent further aggravated, accelerated and intensified the need for the left total knee replacement surgery. Surprisingly, the 2001 accident and resulting surgeries are not mentioned in the report.

The Board notes that while the ALJ's recitation of Dr. Jones' testimony is accurate, Dr. Jones also stated that claimant's job duties with respondent, including kneeling, squatting, climbing, lifting, pushing and pulling while loading and unloading new cars onto his truck transport trailer, would aggravate, accelerate and/or intensify claimant's present need for a total left knee replacement surgery.

³ Ibid. at 16.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁷

The ALJ determined that claimant's need for left knee replacement surgery stemmed from the 2001 accident in Missouri. As that matter had settled as to all issues, claimant was denied any medical treatment for the left knee. In part, the ALJ based his opinion on the medical opinion of Dr. Jones that claimant's disease process from the 2001 injury would have eventually led to the knee replacement surgery. While the Board agrees that Dr. Jones did indeed state that, Dr. Jones also stated that claimant's ongoing duties with respondent aggravated, accelerated and/or intensified claimant's need for the total knee replacement surgery on the left side. Additionally, claimant testified that his duties with respondent caused his knee pain to increase and his ability to perform his duties for respondent lessened.

The ALJ rejected the medical opinion of Dr. Koprivica that the need for the surgery stemmed from the 1994 accident. Dr. Koprivica failed to even mention the 2001 accident, an injury which caused claimant's percentage of impairment in the left knee to more than double. There is no reason that this injury should be ignored, unless the fact that there was no medical treatment available was somehow communicated to Dr. Koprivica. The

⁴ K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2010 Supp. 44-501(a).

⁷ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Board agrees that Dr. Koprivica's opinion in this matter lacks credibility. The opinions of Dr. Jones are entitled to greater weight herein.

However, the Board disagrees with the determination by the ALJ that the need for the left knee replacement surgery stems totally from the 2001 accident. Claimant testified that his left knee continued to worsen with his ongoing labors for respondent. This continued through November 2010. Dr. Jones also noted that the continued work by claimant for respondent accelerated, aggravated and intensified the need for the surgery. The Board finds that claimant has satisfied his burden of proving that the current need for the left knee replacement surgery stems, at least in part, from claimant's continued employment with respondent through November 2010. The Order of the ALJ is reversed on this issue. Claimant is entitled to medical treatment for the left knee, including the total knee replacement surgery, due to a series of traumatic injuries through November 2010.

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.⁸

Claimant has suffered a multitude of accidents in this matter over the years. Several accidents and resulting surgeries for his left knee occurred beginning in 1994 and continuing off and on through 2010. Claimant's attorney appears to have attempted to litigate this entire matter in connection with the 1994 accident. However, both the ALJ and the Board have determined that claimant's need for the left knee surgery stems from the several more recent injuries to the left knee and not from the 1994 accident. Claimant was able to return to work after that 1994 accident and the resulting surgeries, performing his

⁸ K.S.A. 44-536(g).

regular duties for respondent. The 2001 accident substantially increased claimant's functional impairment. Additionally, claimant's ongoing duties for respondent increased his pain and the aggravation of the left knee.

Claimant bases his position regarding which accident led to the need for the left knee replacement on the medical opinion of Dr. Koprivica. However, several things about Dr. Koprivica's opinion are disturbing. During the first examination on May 3, 2010, Dr. Koprivica seems to focus on the right knee rather than the left. Additionally, when Dr. Koprivica was provided the medical records of Dr. Jones, he seemed to almost totally ignore the 2001 accident and its resulting increase in the left knee functional impairment. From the time sheet submitted by claimant's attorney, it appears that claimant's attorney attributed all of his time against the 1994 accident and none for his representation from the pursuit of the series of traumas through claimant's last day with respondent. Nevertheless, since compensation is being awarded in Docket No. 1,054,065, no attorney fees are appropriate or necessary in Docket No. 218,941. The Board finds that, pursuant to K.S.A. 44-536(g), the denial of attorney fees should be affirmed.

CONCLUSIONS

Claimant has satisfied his burden of proving that his need for the left knee replacement surgery stems, at least in part, from claimant's ongoing labors for respondent through November 2010. The Order of the ALJ denying any compensation and medical treatment for that injury for that aggravation and surgery is reversed. Respondent and the insurance company on the coverage in November 2010 shall be responsible for the cost of the surgery. The denial of attorney fees is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated February 24, 2011, should be, and is hereby, reversed with regard to the authorization for the total left knee replacement surgery but affirmed with regard to the denial of attorney fees and costs in this matter.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John E. McKay, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier Liberty
Mutual Insurance Company
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Continental National Indemnity Company
Kenneth J. Hursh, Administrative Law Judge